IN THE

Supreme Court of the United States

No. .....

VAN CAMP SEA FOOD CO. INC., a corporation, and ANTONIO FRANCISCO,

Petitioners,

vs.

ROBERT A. NORDYKE,

Respondent.

BRIEF IN SUPPORT OF PETITION.

Jurisdiction.

Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. Sec. 347).

Judgment of the trial court was entered August 28, 1942 [R. 15].

The opinion of the Circuit Court of Appeals was rendered, filed and entered on February 11, 1944 (140 F. (2d) 902) [R. 252-253].

Petition for rehearing was denied April 5, 1944 [R. 253].

Statement of Facts.

The statement of the case containing all that is material to the consideration of the questions presented, with appropriate page references to the printed record, is set forth in the petition, *supra.*

Statutes Involved.

The statutes involved are Section 33 of the Act of June 5, 1920, Chap. 250, 41 Stat. 1007, 46 U. S. C. A. Sec. 68; Act of April 22, 1908, Chap. 149, Sec. 1, 35 Stat. 65, 45 U. S. C. A. Sec. 51.

Because of their length, relevant portions of the statutes are quoted in the Appendix hereto.

Specifications of Error to Be Urged.

The Circuit Court of Appeals erred:

1. In holding that the law side of the District Court of the United States had jurisdiction to hear and determine either cause of action alleged in the complaint.

2. In holding that the two causes of action for damages were and could be maintained under the provisions of Section 33 of the Act of June 5, 1920, Chap. 250, 41 Stat. 1007, 46 U. S. C. A. Sec. 68 [R. 237].

3. In holding that respondent "based and presented his entire action in the court below upon the Jones Act and in each cause of action relied upon the same negligent acts of his employers [R. 241].

4. In holding that mere ownership of a part of a vessel by the master thereof is sufficient, in and of itself, to support a finding that such master was an employer of respondent at the time of the injury [R. 242-243].

5. In holding that there was no prejudicial error in the introduction into evidence of the wireless message or the various statements made by the doctor at the Island and the Pharmacist's Mate.

6. In holding that respondent's complaint at the time of trial was not at all predicated on the failure of the master to procure an X-ray.

7. In holding that the trial court committed no error in admitting into evidence respondent's testimony with

reference to hospital and medical expenses incurred after he had been given a master's certificate entitling him to care and treatment at the facilities of the United States Public Health Service.

8. In holding that the admission into evidence of the doctor's testimony relating to the history of the injury, as well as his writing memorializing it, was not error warranting a reversal of the judgment [R. 247-248].

9. In holding that the doctor's testimony of what respondent told him at the examination, as well as the doctor's written memorial of respondent's statements, consisted of mere repetitious testimony of *admitted* facts or of incidents which had been otherwise *properly* received in evidence.

10. In holding that no error was committed in admitting into evidence the testimony of this same doctor with reference to what would be regarded as *proper* treatment of respondent for the suffered injury.

11. In holding that the court instructed the jury fully and fairly on all the law applicable to the case.

12. In holding that petitioners' proposed instructions were surplusage and were properly not given by the trial judge.

13. In holding that the contention that the instructions to the jury assume that appellants were negligent has no merit.

14. In holding that other assignments of error in the instructions to the jury, not referred to in the Opinion of the Circuit Court of Appeals, are not tenable.

15. In holding that the record reveals ample evidence to support the jury's verdict in both causes of action.

16. In holding that there is no reversible error in the record.

ARGUMENT.

1. The Circuit Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

This point involves a consideration of Specifications of Error Nos. 1 and 2; and Nos. 1 and 2 under the heading "Questions Presented", *supra.*

The Circuit Court of Appeals holds that a suit for damages predicated upon an alleged failure of the master of a fishing vessel to provide medical and hospital care for an injured seaman is a cause of action which is provided for by the Jones Act.

This Honorable Court has not decided this question but should do so, for the reason that the American Merchant Marine is increasing by leaps and bounds and a logical and reasonable construction of the Jones Act is necessary in order to settle uncertainties which have arisen because of the use in many of the decisions of general language when no dispute was presented to the Court which might justify the assumption that the Court deliberately and intentionally selected the particular language used.

An analysis of the Jones Act with reference to the particular point involved in the case at bar requires a discussion of the general maritime law as it existed before the Jones Act and a discussion of that *part* of the Jones Act which relates to *personal* injuries. The portion of the Jones Act which provides that, the personal representative of any seaman whose death results from personal injury suffered in the course of his employment may maintain an action for damages at law with the right of trial by jury and that in such action all statutes of the

United States *conferring* or *regulating* the right of action for death in the case of railway employees shall be applicable, must be laid aside because of the obvious fact that actions for damages for personal injuries and actions for damages by reason of wrongful death are separate and distinct.

The Jones Act, in *creating* a cause of action for damages for death states that, "in such action *all* statutes of the United States *conferring* or *regulating* the right of action for death in the case of railway employees shall be applicable. In the case of personal injuries suffered by a seaman in the course of his employment, the Jones Act does not adopt all statutes of the United States *codifying* the common law rules of liability with reference to employers which existed prior to the adoption of the Federal Employers' Liability Act. The Jones Act merely adopts that portion of the Federal Employers' Liability Act which *modifies* or *extends* the theretofore existing common law right or remedy in cases of personal injury to railway employees.

At this point it is proper to ascertain what the Employers' Liability Act accomplished.

> "Briefly stated, the effect of the Federal Employers' Liability Act in cases to which it is applicable is to abolish certain defenses which were recognized at common law in favor of an employer when sued by his employee for injuries received in the course of employment. It abolishes the defense embodied in the fellow servant rule and the defense of contributory negligence in all cases where the injury is shown to have been contributed to by the violation by the common carrier of any statute enacted for the safety of employees, and in other cases it estab-

lishes the doctrine of comparative negligence, so that the contributory negligence of the employee will not bar a recovery, but merely diminish the damages recoverable. The Act also abrogates the defense of assumption of risk in all cases where the injury was contributed to by the violation by the common carrier of any statute enacted for the safety of employees, and, as amended by the Act of Aug. 11, 1939, in all cases where such injury . . . resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. Section five prevents the common carrier from exempting itself from liability under the Act by contract, rule, regulation, or other device."

35 *American Jurisprudence*, 821; Sec. 399.

"Congress took a major step toward modification of the common law barrier against employee recovery in accident suits in the Federal Employers' Liability Act of (June 11) 1906, 34 Stat. 232, c. 3073, repassed with alterations not material in (April 22) 1908, 35 Stat. 65, c. 149, 45 U.S.C.A. §51. This Act, in its principal features, abolished the fellow servant rule, substituted comparative negligence for the strict rule of contributory negligence, and allowed survivors' actions for tort liability."

Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 62; 87 L. Ed. 610, 615.

The Federal Employers' Liability Act also modified the common law rule with reference to the abatement of actions for damages upon the death of the person injured, as follows:

"Any right of action given by this chapter to a person suffering injury shall survive to his or her

personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury."

45 *U. S. C. A.*, Sec. 59.

The foregoing section is somewhat different from the ordinary Lord Campbell's Act. Ordinarily, and in most of the states, even though an injured person has collected damages for personal injuries during his lifetime, if he dies as a proximate result of the injuries sustained, his heirs or personal representatives may, nevertheless, maintain an action for damages for death and the fact that the injured person has thertofore recovered damages by reason of the personal injuries is no defense to the subsequent action for damages for death. However, pursuant to the Federal Employers' Liability Act, if the injured employee has recovered damages, then there is no right of action which shall survive his death. (*Seaboard Airline R. Co. v. Oliver*, 261 F. 1.)

The foregoing authorities clearly establish that, so far as personal injuries suffered by seamen in the course of their employment are concerned, the sole purpose of Congress in adopting the Jones Act was to remove the defense which had theretofore been available to owners of vessels and employers of seamen in those cases where the personal injury was proximately caused, in whole or in part, by the negligence of any of the officers employed on the vessel or negligence on the part of any of the unlicensed personnel.

That part of the Federal Employers' Liability Act which provides that every common carrier by railroad while engaged in interstate commerce shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce "by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road bed, works, boats, wharves, or other equipment" does not modify or extend *any* common law right or remedy whatever. The portion of the Act just referred to is merely a codification and continuation of what was theretofore the sole and only basis upon which an employer was liable in damages for personal injuries suffered by an employee in the course of his employment under the common law.

> "It is urged by counsel for defendant that by the enactment of the federal Employers' Liability Act 'new and somewhat different obligations are created.' While the act abolished what is known as the 'fellow-servant doctrine,' there is nothing contained therein which changes the rule as respects the nonassignable duty of the master to exercise reasonable care in providing the servant with reasonably safe tools and appliances with which to perform the work required of him by the master."
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> *Coal & Coke Ry. Co. v. Deal,* 231 F. 604, 608.

In a maritime case which was decided approximately three years before the Jones Act was adopted, and in which case this Honorable Court denied a petition for a writ of certiorari, the court said:

> "The appellee, while in the performance of his duties as assistant engineer of the ship Frank C. Ball, owned by appellant, and while on a voyage from

Lorain, Ohio, to Duluth, Minn., was seriously injured in an attempt to start a defective feed pump used for supplying water to the boilers. To recover the damages suffered appellee filed libel in admiralty against the ship; the appellant giving bond to answer the decree. Upon hearing in open court, decree passed for libelant, from which this appeal is taken.

"The ground on which the right to recovery is rested is that the pump was so defective as to render the ship unseaworthy as respects appellee, and to amount to a negligent failure of duty to supply and keep in order the proper appliances appurtenant to the ship—*a duty analogous to the ordinary duty of a master to furnish his servant a safe place to work and safe appliances to work with.*" (Emphasis added.)

Globe S. S. Co. v. Moss, 245 F. 54.

The next question, in view of the nature of the cause of action asserted by the respondent in the case at bar is whether there was ever any duty under the common law which required an employer to furnish medical care in cases where the injury sustained by an employee was not proximately caused, either in whole or in part, by negligence on the part of the employer.

"In the absence, however, of any statutory obligation, the courts administering the common law have long since established the rule applicable to all descriptions of employees except apprentices, that there is no general obligation on the part of an employer to provide medical or surgical attendance as an implied incident of a contract of hiring, and that the employer is not bound to defray the expenses of such attendance upon an employee who falls ill *or* receives

personal injuries in the course of the employment, unless he has expressly or impliedly agreed to do so. . . . The rule is said to apply notwithstanding the illness or disease arises from the negligence of the employer, although the employer is, in a common-law action for negligence, answerable to an employee in damages for all losses proximately resulting, including physician's and surgeon's charges, from the employer's negligence."

35 *American Jurisprudence*, 536, 537; Sec. 108.

There is nothing in the Federal Employers' Liability Act which places upon common carriers the duty of caring for sick or injured employees. This Honorable Court has held many times that the sole basis of liability, in so far as common carriers are concerned, under the Federal Employers' Liability Act, is negligence on the part of the carrier or on the part of a fellow servant, proximately causing the injury complained of. There is therefore no ground upon which to contend that common carriers subject to the provisions of the Federal Employers' Liability Act are under any duty to furnish medical attention or hospital care. It is also difficult to understand how a common carrier actually maintaining a hospital and employing physicians to treat injured employees could be liable under the Federal Employers' Liability Act in the event a surgeon negligently aggravated the original injury or caused a new one in the course of treatment for the reason that no railway employee is entitled to maintain an action pursuant to the Federal Employers' Liability Act unless he suffers his injury *while* he is employed by the common carrier *in* interstate or foreign *commerce*. (*Metzger v. Western Md. Ry. Co.*, 30 F. (2d) 50.)

In the case at bar, the complaint alleges and the answer admits that the injury sustained while respondent was engaged in the act of fishing for tuna "disabled plaintiff from performing any further duties aboard said vessel as a fisherman" [R. 4]. If, as a matter of fact, the plaintiff's original injury was aggravated by a failure on the part of the master of the vessel to provide medical care, it cannot be said that the aggravation was a personal injury suffered "in the course of his employment." It is axiomatic that the Jones Act in no event gives any right of action for any personal injury which is *not* suffered by a seaman *in the course of his employment.* Can it be said that a seaman whose injury admittedly disables him from performing any further duties whatever, is nevertheless acting in the course of his employment while receiving or while *not* receiving medical care? Respondent sustained his original injury while he was acting in the course of his employment as a fisherman. He performed certain emergency duties as a radio operator subsequent to his original injury but the alleged aggravation of the original injury was not sustained while he was acting in the course of his employment as a radio operator.

> "When an employee is off duty the relation of employer and employee is suspended and does not reattach until the employee resumes the master's work."
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> *Postal Tel. Cable Co. v. I. A. C.*, 1 California Reports, 2nd Series, at p. 733.

While the foregoing authority is not binding upon this Honorable Court, it is offered for whatever persuasion it exerts in support of petitioners' contention that an injury sustained by a seaman by reason of an alleged negligent omission to furnish him with medical care is not an

injury which is sustained in the course of the seaman's employment. Petitioners are aware of the cases holding that any injury sustained by a seaman while he is subject to the call of duty is an injury sustained in the course of his employment but in the case at bar, as petitioners have pointed out, it was alleged and admitted that respondent was disabled from performing any further duties aboard the vessel as a fisherman.

In many of the cases which have been decided by this Honorable Court, it has been said in substance that the election referred to in the Jones Act is an election between the remedy afforded by the general maritime law prior to the adoption of the Jones Act and the remedy afforded by the Jones Act; and not between either of the foregoing and the right to maintenance, care and wages. The last case wherein the court was required to decide a *dispute* as to the necessity of an election is *Pacific S. S. Co. v. Peterson,* 278 U. S. 130, 73 L. Ed. 220. Prior to that case, in *Panama R. Co. v. Johnson,* 264 U. S. 375, 68 L. Ed. 748, this Honorable Court had said as follows:

> "A more reasonable view, consistent with the spirit and purpose of the statute as a whole, is that the words are used in the sense of 'an action to recover damages for such injuries,'—the emphasis being on the object of the suit rather than the jurisdiction in which it is brought. So we think the reference is to *all* actions brought to recover compensatory damages under the *new* rules, as distinguished from the allowances covered by the *old* rules, usually consisting of wages and the expense of maintenance and cure." (Emphasis added.)

The case of *Engel v. Davenport,* 271 U. S. 33; 70 L. Ed. 813, approved the prior decision in the case of *Panama*

R. Co. v. Johnson (supra), and indicated quite clearly that the election was one between maintenance, cure and wages and a suit for damages whether or not the suit for damages was maintained by libel *in personam* or by action for damages at law. The first serious difficulty arising out of the Jones Act was presented in the case of *Pacific S. S. Co. v. Peterson (supra)*. In this case, the injured seaman had received maintenance and cure as far as medical and surgical attention could reasonably effect a cure and had also received his wages to the end of the voyage prior to the commencement of his suit for damages. In order to retrieve Peterson from his dilemma arising from the fact that he had accepted maintenance, cure and wages which, according to the two prior decisions of this Honorable Court, prevented him from maintaining an action for damages, this Court decided that it did not mean what it had said in the two prior cases but that on the contrary, an injured seaman was entitled in any event, and regardless of any suit for damages, to maintenance, cure and wages. The Court says:

> "The right to recover compensatory damages under the new rule for injuries caused by negligence is, however, an alternative of the right to recover indemnity under the old rules on the ground that the injuries were occasioned by unseaworthiness; and it is between these two inconsistent remedies for an injury, both grounded on tort, that we think an election is to be made under the maritime law as modified by the statute."
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> *Pacific S. S. Co. v. Peterson*, 278 U. S. 130, 138; 73 L. Ed. 220, 224.

This case and others decided since, make reference to the old rules and refer to the Jones Act as a new rule.

A seaman who suffered injury by reason of a negligent failure on the part of the *master* of a vessel to furnish him with medical attention and hospital care had a cause of action for compensatory damages long before the Jones Act was ever thought of. The master of a vessel has, from time immemorial, been the agent of the owner. In those cases where the employer of the master was not the owner of the vessel but was merely a bare boat charterer, the master was nevertheless the agent of the charterer and represented, as the case may be, the owner or charterer in all dealings with the seamen engaged as such in the navigation of the vessel. Therefore, when the master of a vessel negligently failed to provide medical attention or hospital care for seamen falling ill or suffering injury in the service of the ship, it was a negligent breach of the obligation of the owner or charterer to provide medical attention and hospital care and for such negligent breach of the obligation the owner or charterer was liable in compensatory damages.

In *The Iroquois,* 194 U. S. 240, 48 L. Ed. 955, the Court says:

> "The duty to provide proper medical treatment and attendance for seamen falling ill or suffering injury in the service of the ship has been imposed upon the shipowners by all maritime nations."

The Iroquois involved a review of a decree of the United States Circuit Court of Appeals for the Ninth Circuit which affirmed a decree of the District Court for the Northern District of California in favor of Matthew Bridges for damages by reason of the failure of the master to secure surgical attendance for the treatment of injuries sustained by him while in the performance of his duties.

In *The Kenilworth*, 144 F. 376, 4 L. R. A. (N. S.) 50, the Court says:

> "Legal responsibility for negligence does not exist in the absence of a duty of care, and upon the scope of the correlative duty in any case the extent of the liability for negligence depends. In this case the duties which it is asserted were not discharged may be stated, in *general* terms, to be that of the shipowners to provide *proper* medical treatment and attendants for seamen suffering injury in the service of the ship, and that of the master, where a serious accident occurs, to exercise a reasonable judgment as to putting into the nearest available port; but whether or not these duties have in any instance been adequately discharged is to be determined with reference to the peculiar facts of the particular case." (Petition for writ of certiorari denied April 30, 1906.) (Emphasis added.)

This Honorable Court has very recently decided that under the old rules of liability for injuries sustained as the result of unseaworthiness there is no necessity whatever to allege or prove negligence.

In the case of *Mahnich v. Southern S. S. Co.*, Vol. 88 L. Ed. Adv. Op. 415, the Court says:

> "But later cases in this and other federal courts have followed the ruling of The Osceola, 189 U. S. 158, 47 L. ed. 760, 23 S. Ct. 483, *supra*, that the exercise of due diligence does not relieve the owner of his obligation to the seaman to furnish adequate appliances. * * *
>
> "If the owner is liable for furnishing an unseaworthy appliance, even when he is not negligent, a fortiori his obligation is unaffected by the fact that

the negligence of the officers of the vessel contributed to its unseaworthiness. It is true that before the Jones Act the owner was, in other respects, not responsible for injuries to a seaman caused by the negligence of officers or members of the crew."

The decision last referred to seems to indicate quite clearly that this Honorable Court is now committed to the rule that if a seaman suffers injury as a result of the unseaworthiness of the vessel or the failure of the owner or the officers of the vessel to supply and keep in reasonably safe condition all appliances appurtenant to the vessel, the seaman is entitled to recover compensatory damages without alleging or proving negligence. It is therefore obvious that such cause of action is not within the provisions of the Jones Act for the reason that there is no liability under the Jones Act in the absence of negligence. If petitioners understand what this Honorable Court has said in the *Mahnich* case, *supra*, it is simply this: Mahnich could, prior to the Jones Act and without its aid or the rules provided therein, have maintained an action for compensatory damages against his employer, the Southern S. S. Co., under the general maritime law. If this is so, and if the many cases referring to the requirement of an election between the old rules and the new rule mean what they say, then an anomalous situation is presented. The cases say that the seaman cannot have the benefit of both remedies. He must elect between the right to recover indemnity under the old rules and the right to recover damages under the new rule. How can a man elect between two inconsistent remedies when the same factual background would *prevent* him from pursuing but *one* of the two causes of action?

Under the old cases, before the adoption of the Jones Act (*The Osceola,* 189 U. S. 158; 47 L. Ed. 760), the seaman could not recover any damages whatever, if the unseaworthiness or failure to keep in order the proper appliances appurtenant to the ship was the result of negligence on the part of any of the officers of the ship or of a fellow servant. Does the Jones Act mean that the seaman can elect to recover damages resulting from unseaworthiness of the vessel if the unseaworthiness does not exist when the ship breaks ground but is caused by the negligence of an officer of the ship or a fellow crew member after it is upon the high seas? If the Court gives an affirmative answer to the last question, how could such answer be reconciled with the decision in the *Mahnich* case which says that the cause of action under the old rule "is unaffected by the fact that the negligence of the officers of the vessel contributed to its unseaworthiness"?

In the *Mahnich* case the trial court denied damages because the suit had not been commenced within the limitation provided in the Federal Employers' Liability Act. At the time the Jones Act was adopted the time within which an action for damages could be brought, as set forth in the Federal Employers' Liability Act, was two years. That has been amended since so that the time is now extended to three years but did the Jones Act adopt only those portions of the Federal Employers' Liability Act which were in existence at the time of the enactment of the Jones Act or did it also adopt, without saying anything about it, all future amendments thereto?

This Honorable Court says in the *Mahnich* case:

> "No question is raised with respect to petitioner's right to recover under the Jones Act or his right to the award of maintenance and cure or its adequacy." (88 L. Ed. Ad. Op. at p. 416.)

Therefore, the Court was not deciding or intending to decide that Mahnich could have maintained his action under the provisions of the Jones Act. When the language immediately hereinabove quoted was used is it not true that this Honorable Court was indirectly pointing to the fact that no action for damages can be maintained under the Jones Act if the injury is caused by unseaworthiness or a failure to supply and keep in order the proper appliances appurtenant to the ship, for the reason that the Jones Act did not adopt the codification of the common law basis of liability on the part of an employer who fails to exercise reasonable care in and about furnishing a reasonably safe place to work and reasonably safe tools and appliances?

In the case of *Aguilar v. Standard Oil Co.*, 318 U. S. 724, 87 L. Ed. 1107, the Court was considering the question of wages, maintenance and cure. The Court says:

> "Among the most persuasive incidents of the responsibility anciently imposed upon a shipowner for the health and security of sailors was liability for the maintenance and cure of seamen becoming ill or injured during the period of their service. In the United States this obligation has been recognized consistently as an implied provision in contracts of marine employment. Created thus with the contract of employment, the liability, unlike that for indemnity or that later *created* by the Jones Act, in no sense is predicated on the fault or negligence of the shipowner. Whether by traditional standards he is or is not responsible for the injury or sickness, he is liable for the expense of curing it as an incident of the marine employer-employee relationship. So broad is the shipowner's obligation that negligence or acts short of culpable misconduct on the seaman's part will

not relieve him of the responsibility. * * * Conceptions of contributory negligence, the fellow-servant doctrine, and assumption of risk have no place in the liability or defense against it. Only some wilful misbehavior or deliberate act of indiscretion suffices to deprive the seaman of his protection." (Emphasis added.)

This decision uses certain language which is in conflict with the *Mahnich* case, *supra*. Liability for indemnity, according to the *Mahnich* case, in no sense is predicated upon the fault or negligence of the shipowner. Therefore, if the liability for failure to furnish care is subject to the rule set forth in the *Aguilar* case that the liability for indemnity is in no sense predicated on the fault or negligence of the shipowner, acting through the master, then there could be no liability under the Jones Act for the reason that negligence is the foundation of liability in all actions to which the Jones Act is applicable.

If a seaman cannot deprive himself of his right to medical attention or hospital care by any negligence on his part and if "conceptions of contributory negligence . . . have no place in the liability or defense against it", how can an alleged failure to provide medical attention or hospital care be within the provisions of the Jones Act when in every action which is within that statute contributory negligence is a *pro tanto* defense?

If injuries sustained as a result of unseaworthiness of a vessel or a failure to supply and keep in order the proper appliances appurtenant to the ship and injuries sustained as a result of the failure on the part of the master of a vessel to furnish reasonably required medical care are put in the same category, then it would not be necessary for the injured seaman to prove negligence at all. His cause of action would be one for compensatory damages arising out of a breach of a contractual duty. The shipowner is an insurer with reference to the seaworthiness of the ship

and its appliances, according to the latest decision of this Honorable Court. Is the shipowner also an insurer with reference to injuries sustained as the result of a breach, negligent or otherwise, of the shipowner's duty to furnish medical attention and hospital care?

If suits for damages arising out of a failure to furnish medical attention and hospital care are to be placed in the same category as suits for compensatory damages resulting from unseaworthiness, then it is a certainty that the United States District Court was without jurisdiction of either of the causes of action asserted by the respondent for the reason that there is no allegation or proof with reference to the required diversity of citizenship which must be present in all actions at law in said court.

It has been twice decided by this Honorable Court that the language "jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located", contained in the Jones Act, relates only to venue.

In *Panama R. R. Co. v. Johnson,* 264 U. S. 375, 68 L. Ed. 748, the Court says:

> "A reading of the provision now before us with those sections, and in the light of the policy carried into them, makes it reasonably certain that the provision is not intended to affect the general jurisdiction of the district courts as defined in §24, but only to prescribe the venue for actions brought under the new act of which it is a part. No reason why it should have a different purpose has been suggested, nor do we perceive any. Its use of the word 'jurisdiction' seems inapt, and therefore not of special significance. The words 'shall be' are stressed by the defendant, but as they are found also in the earlier

provisions which uniformly have been held to relate to venue only, they afford no ground for a distinction."

In *Engel v. Davenport*, 271 U. S. 33, 70 L. Ed. 813, the Court says:

> "This, as was held in the Panama R. Co. Case, p. 385, was not intended to affect the general jurisdiction of the Federal Courts, but only to prescribe the venue of actions brought in them under the act."

If this Honorable Court correctly held that there is nothing in the Jones Act which has anything to do with the jurisdiction of a United States District Court, then it would seem to follow as a matter of course that no action for damages on the law side of a United States District Court can be maintained under the Jones Act unless there is diversity of citizenship.

The only other possible basis of jurisdiction would be a contention that "the matter in controversy arises under the laws of the United States."

In the case of *Gully v. First National Bank*, 299 U. S. 109, 114, 81 L. Ed. 70, 73, the Court quotes with approval certain language used in a prior decision as follows:

> "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends."

The validity, construction or effect of the Jones Act could not be submitted to a jury as a question of fact.

The validity, construction or effect of the Jones Act is a question of law. Neither cause of action pleaded in the complaint in the case at bar makes any allegation with reference to the validity or construction or effect of the Jones Act. All that is said in this respect is that "plaintiff elects to maintain this action under the provisions of Section 33 of the Act of June 5, 1920, c. 250, 41 Stat. 1007" [R. 7]. The defendants denied that "the plaintiff has any right to maintain this action under the provisions of Section 33 of the Act of June 5, 1920, c. 250, 41 Stat. 1007" [R. 11].

The Jones Act did not give to a seaman for the first time the right to a trial by jury. By section 9 of the Judiciary Act of (September 24) 1789, 1 Stat. 76, c. 20, 28 U. S. C. A. Sec. 371 (Third) Congress conferred on the district courts exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction saving to suitors, in *all* cases, the right of a common law remedy, where the common law is competent to give it. One of the incidents of a common law remedy has always been the right to a jury trial. Therefore, every cause of action which existed in favor of a seaman prior to the adoption of the Jones Act carried with it the right on the part of the seaman to sue his employer by libel *in personam* in a court of admiralty or to commence and maintain suit for damages in a state common law court, with or without a jury, or in the event of a concurrence of jurisdictional amount and diversity of citizenship, in a United States District Court on the law side with or without a jury.

In the case of *De Zon v. American President Lines,* 318 U. S. 660, 87 L. Ed. 1065, this Honorable Court held that an injured seaman was entitled to the benefit of the

provisions of the Jones Act in a suit for damages resulting from the *malpractice* of a ship's physician in and about the treatment of an injured seaman. This was for the reason that the physician was an *employee* of the American President Lines and he was on the ship for the purpose of treating injured seamen.

No question was raised in the case of *De Zon v. American President Lines* with reference to the proposition that De Zon was not injured in the course of his employment as a seaman. The facts set forth in the opinion indicate clearly that De Zon could not have been acting in the course of his employment or subject to the call of duty at the time he claimed the ship's doctor negligently injured him. What this Honorable Court would have said in that case if this point had been suggested or argued cannot be ascertained. Of course, the requirement that the injury be sustained in the course of the seaman's employment is a condition precedent to any liability whatever under the Jones Act but the fact that it could have been the subject of decision or necessarily involved does not mean that this Honorable Court considered or passed upon the question.

As was said in *Pacific S. S. Co. v. Peterson (supra)*, if no question is raised as to a particular part of a statute general statements "ought not to control the judgment in a subsequent suit when the very point is presented for decision or to prevent the determination as an original question of the proper construction of the statute in that particular."

> "Analogous to the principle of *obiter dicta* is the rule that a decision is not authority upon a point not raised by counsel or referred to in the opinion, *even though necessarily involved in the decision.* Thus,

a decision which fails to note the existence of a statute is not an authority upon the construction of that statute." (Emphasis added.)

7 Cal. Jur. 641, Sec. 46.

Aside from the foregoing remarks, the *De Zon* case can be readily distinguished from the case at bar for the reason that the Jones Act was adopted for the sole purpose of doing away with the fellow servant doctrine in cases involving injuries to seamen.

> "It would be an anomaly if the *fellow servant rule*, discredited by the Jones Act as a defense in suits for negligence, were to be resuscitated and extended to suits founded on the warranty of seaworthiness, so as to lower the standard of the owner's duty to furnish safe appliances below that of the land employer." (Emphasis added.) (*Mahnich v. Southern S. S. Co.*, 88 L. Ed. Ad. Op. 414, 418.)

The physician in the *De Zon* case was a fellow servant. In the case at bar the general maritime law did not deny to a seaman the right to recover compensatory damages arising from a negligent failure of the master of the vessel to provide him with medical attention or hospital care. Therefore, the Jones Act was not adopted for the purpose of discrediting any fellow servant rule in such cases.

The *De Zon* case is not authority supporting the contention that the Jones Act is applicable to the facts in the case at bar. It involved a case which, under the *general* maritime law afforded the injured seaman no relief whatever against the shipowner for the reason that the *master*

of the vessel was *not* charged with any negligent failure to provide ordinary medical attention.

The case of *Cortes v. Baltimore Insular Line*, 287 U. S. 367, 77 L. Ed. 368, cited by the lower court, lends considerable force to petitioners' contention that the respondent's cause of action is not a right created or enlarged by the Jones Act.

This Honorable Court says:

> "By the *general* maritime law a seaman is without a remedy against a ship or her owners for injuries in his person, suffered in the line of service, with two exceptions only. * * * A remedy is his also if the injury has been suffered through breach of the duty to provide him with 'maintenance and cure.' * * * If the failure to give maintenance or cure has caused or aggravated an illness, the seaman *has* his right of action for the injury thus done him, the recovery in such circumstances including not only necessary expenses, but also compensation for the hurt. The Iroquois, 194 U. S. 240, 48 L. Ed. 955, 24 S. Ct. 640, 16 Am. Neg. Rep. 638." (Emphasis added.)
>
> *Cortes v. Baltimore Insular Line*, 287 U. S. 367, 370-371, 77 L. Ed. 368, 371.

If we had no Jones Act and the sufficiency of the complaint in the case at bar were tested by the foregoing statement as to the *general* maritime law, would it state a cause of action? If the answer is, as it *must* be, in the affirmative, what new or enlarged remedy or right does Mr. Nordyke gain from the Jones Act?

In the same case this Court stated *the* point of law actually *involved* as follows:

> "We are to determine whether *death* resulting from the negligent omission to furnish care or cure is *death from personal injury* within the meaning of the statute." (Emphasis added.)
>
> *Cortes v. Baltimore Insular Line*, 287 U. S. 367, 372, 77 L. Ed. 368, 371.

This Court was *not* called upon to determine whether *"personal injuries"* resulting from a failure to provide medical care were "personal injuries" within the meaning of the Jones Act. What this Court said in its decision must be appraised, understood and interpreted in the light of the question presented for decision. The petitioners are cognizant of what this Court said (287 U. S. 367, at 374-375) about the *possibility* that "while the seaman was still alive, his cause of action for personal injury created by the statute *may* have overlapped his cause of action for breach of the maritime duty of maintenance and cure, just as it *may* have overlapped his cause of action for injury caused through an unseaworthy ship" and "In such circumstances it was his privilege, in so far as the causes of action covered the same ground, to sue indifferently on any one of them. The overlapping is no reason for denying to the words of the statute the breadth of meaning and operation that would normally belong to them, *at all events when a consequence of the denial is to withhold any remedy whatever from dependent next of kin.*" (Emphasis added.)

But this Court was not called upon to *decide* whether there *was* a cause of action under the Jones Act which would have been available to Cortes had he lived. Neither was it called upon to decide, as a question of law in issue, whether there *was* any *overlapping* of causes of action which Cortes could have sued upon. I respectfully point out that there is no question of any *election* between the relief afforded and *created* by the Jones Act on account of death and some remedy afforded by the old rules, for the simple reason that there was no relief afforded by the general maritime (the old) rules on account of death.

It is respectfully contended that the Jones Act should be construed as it was in the first case decided by this Honorable Court wherein it was presented for construction. The statute should be construed in the light of the evil which Congress intended to eradicate. The sole and only benefit which Congress could have given to seamen, regardless of how or when they might be injured, by the adoption of the Jones Act was to give them the single right they did not already have, to wit, a right to recover damages if they suffered injury as a result of the negligence of a fellow crew member. When the Congress said that the seaman was required to make an election, the election referred to was between any type of action for compensatory damages for personal injuries or the acceptance or recovery of maintenance, cure and wages. Legislation contemporary with and prior to the adoption of the Jones Act which in many states gave an injured employee a right to elect whether he would take the bene-

fits of workmen's compensation laws or to sue his employer at common law for damages obviously had some effect upon The Congress. Much confusion has resulted from changing the rule which was originally asserted in the cases of *Panama R. Co. v. Johnson,* 264 U. S. 375, 68 L. Ed. 748 and *Engel v. Davenport,* 271 U. S. 33, 70 L. Ed. 813.

The question of what is meant by "election" as that word is used in the Jones Act must be reconsidered by this Honorable Court at some time. It is contrary to all concepts of justice to permit an injured seaman to have a double recovery. In *The Calmar,* 303 U. S. 525, 82 L. Ed. 993, this Honorable Court has clearly indicated that it is inclined to extend to any seaman who suffers injury while in the service of the ship a right to demand maintenance and care for the duration of his life if the injury is one which results in a permanent disability. If that is the trend and if a seaman is also entitled to maintain an action for compensatory damages under the Jones Act, he would be making a double recovery. This is so for the reason that one of the elements of damage which may be considered by a jury in arriving at the amount of its verdict is the lost earning capacity of the injured seaman. The element of lost earning capacity is intended, at least in part, to enable the injured seaman to take care of himself in the future and to take the place of what he could have provided for himself if his earning capacity had not been diminished. In other words, if a seaman's earning capacity at the time of an injury is $100 a month, plus the

value of his maintenance aboard the ship, which we will assume is $50 per month, then his total earning capacity would be $150 per month. If he is totally disabled and unable to earn anything whatever in the future, the element of lost earning capacity would be arrived at by a jury by resort to a determination of the present value of the future earning capacity during that part of the seaman's expectation of life when it might be reasonably assumed he would retain his ability to perform services as a seaman. If he can have this and maintenance also and if the recovery of maintenance is no obstacle to the recovery of full compensatory damages in an action at law pursuant to the Jones Act, then there will be in each such case a partial double recovery.

The tax-paying public is vitally interested in a correct solution of all of the questions involved and suggested hereinabove for the reason that the War Shipping Administration is now operating and for more than a year last past has been operating and will, at least until the termination of the state of war now existing, continue to operate a vast merchant marine. The United States Government is the employer of all the seamen employed on such vessels. They are entitled to sue the United States Government pursuant to statutes permitting them to do so by recourse to the Suits in Admiralty Act. It is of vital importance that the United States Government know whether an injured seaman is entitled to maintenance, if permanently injured in the service of the ship, for the balance of his natural life and to *also* recover full and complete compensatory damages, including all of the ele-

ments ordinarily included in a verdict in a common law action for damages, in the event the seaman has sustained his injury as a result of negligence on the part of the master, other licensed officers or the unlicensed personnel also employed on such vessels.

This Honorable Court has never decided as a disputed question of law, whether a fisherman or a radio operator-fisherman employed on a fishing boat is a seaman within the meaning of that word as it is used in the Jones Act. The section of the Merchant Marine Act of 1920 which is commonly referred to as the Jones Act is a part of the Merchant Marine Act of 1920. One of the objects of Congress in enacting the Merchant Marine Act of 1920 was to benefit merchant marine seamen. The statutes of the United States with reference to the right of certain individuals to have recourse free of charge, to the facilities of the United States Public Health Service restrict the availability of such facilities to "merchant marine seamen." The Surgeon General has adopted an on and off policy with reference to fishermen. Sometimes the directives permit fishermen to enjoy the facilities of the United States Public Health Service and at other times they are denied the right to utilize such facilities upon the ground that they are not merchant marine seamen. If they are not merchant marine seamen, then it is obvious that they are not seamen within the meaning of that word as it is used in the Jones Act, for the simple reason that the Merchant Marine Act was enacted, not for the benefit of mariners in general, but for the benefit of merchant marine seamen.

2. The Circuit Court of Appeals Has Decided a Vital Question in a Way Probably in Conflict With Applicable Decisions of the United States Supreme Court.

The court below states:

> "The sole jurisdictional provision incorporated in the Act is that 'Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.' This requirement is a modification of that imposed by the Judiciary Act relating to other suits of a civil nature at common law, and when fulfilled confers on a District Court of the United States the requisite authority to hear and determine an action at law for damages by an injured seaman regardless of his citizenship" [R. 241].

If the foregoing statement is correct, an injured seaman would also be entitled to maintain an action at law for damages in a district court of the United States *with a jury furnished at the expense of the tax-payers,* even though the amount involved were only five dollars.

This part of the decision of the court below is squarely in the teeth of the decisions of this Honorable Court in *Panama R. Co. v. Johnson,* 264 U. S. 375, 68 L. Ed. 748 and *Engel v. Davenport,* 271 U. S. 33, 70 L. Ed. 813, in each of which the Court said that the Jones Act had nothing whatever to do with the general jurisdiction of the district courts and that the language referred to by the court below relates to *venue* only.

3. The Circuit Court of Appeals Has Rendered Its Decision in Conflict With an Earlier Decision of the Same Court on the Same Question of Law With Reference to Jurisdiction as to the Second Cause of Action.

All parties to this action and the learned trial judge proceeded on the theory that the second cause of action asserted by the petitioner was for maintenance and cure. This is demonstrated by instructions requested by respondent and given by the Court as follows:

> "In his second cause of action plaintiff asks damages for medical attention and *maintenance* . . ." [R. 222]. (Emphasis added.)

> "In this case, regardless of whether or not you decide that defendant was negligent, you are instructed to award plaintiff *maintenance*. In other words, a seaman such as plaintiff, who is taken sick in the service of a vessel, is entitled to *maintenance* from the defendant shipowner. *Maintenance* is awarded regardless of fault on defendant's part and even if defendant is not at fault. *Maintenance* is to include such a sum of money as is reasonably necessary to maintain plaintiff until he was able to return to work" [R. 226-227]. (Emphasis added.)

The jury rendered its verdict in favor of the plaintiff on the second count and assessed the damages in the sum of $440.00 [R. 14-15].

In the case of *Modin v. Matson Navigation Co.*, 128 F. (2d) 194 at page 196, the Court says:

> "Thus count 2 stated or attempted to state a claim for maintenance. Upon such a claim, if well founded, relief may be granted either in admiralty or at common law. * * * An action at law upon such a

claim may be brought in a State court; if, diverse citizenship exists and the claim is for more than $3,000, it may be brought in a district court of the United States. * * * Here, diverse citizenship was not alleged and, admittedly, did not exist, and the claim was for less than $3,000. Of that claim, therefore, the District Court, sitting as a law court, had no jurisdiction."

4. The Circuit Court of Appeals Has so Far Departed From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Honorable Court's Power of Supervision.

The court below holds that the two causes of action were expressly maintained under the provisions of Section 33 of the Act of June 5, 1920, sometimes called the Jones Act [R. 237].

> "The appellee based and presented his entire action in the court below upon the Jones Act and in each cause of action he relied upon the same negligent acts of his employers" [R. 241].

If the court below, in spite of the fact that the record shows the second cause of action was tried on an entirely different theory, is correct, then the petitioners have been deprived of their right to a jury trial for the reason that the trial court directed the jury to find a verdict in favor of respondent on the second cause of action. How could the jury, under such circumstances, have found a verdict in favor of petitioners on the first cause of action? If, as stated by the court below, respondent was proceeding in both causes of action upon the Jones Act and "relied upon the same negligent acts of his employers" [R. 241],

the jury (*presumably* ordinarily intelligent individuals, and presumably aware of the fact that their verdict on two causes of action would have to be *consistent* if each cause of action required the proof of negligence and proximate causal connection) could do nothing but decide both causes of action in favor of the same party. In this case, however, the trial court prevented the jury from finding a verdict in favor of the petitioners on the second cause of action by telling the jury in legal effect that each and every fact which the respondent was required to prove in order to enable him to recover under the second cause of action had been established *as a matter of law.*

The court below no doubt handled the matter in the fashion in which it did in order to avoid the rule theretofore stated by it in the case of *Modin v. Matson Navigation Co.*, 128 F. (2d) 194. The accepted and usual course of judicial proceedings has always been that an appellate court will not permit any party to assert one theory in a trial court and another in an appellate court. The same rule should apply to *courts* as well. When a trial court has tried an issue in accordance with a theory asserted by the plaintiff and agreed to by the defendants, the appellate court should not be permitted to say, even in order to obviate the reversal of a judgment, that the case was tried on some other theory or pursuant to some other rule of law.

The court below states in its opinion that "appellee's complaint at the time of trial was not predicated on the failure of the master to procure the X-ray, but that the vessel and its owners and operators failed to take him, an employee injured in the course of his employment, as soon as possible to a place where proper medical treatment could be obtained; . . ." [R. 245].

The plaintiff's complaint, paragraphs X, XI, XII and XIII [R. 4-5] specifically refer to the message of the Marine Hospital in San Francisco "giving directions to make for the nearest port for *X-ray* and proper medical attention"; and that "no medical facilities or *X-ray* equipment were available at said San Cristobal Island"; and to the statement of the pharmacist's mate "that immediate *hospitalization* and proper *X-ray* and medical treatment should be given to plaintiff."

It is thus obvious that the respondent, at the outset of the litigation made the question of the absence of an X-ray a material element in his claim of breach of duty.

Turning to the evidence, we find the following references to X-ray in the testimony of respondent and Dr. Alfred E. Gallant:

1. The radio message from the United States Marine Hospital, referring to the *X-ray* was introduced [R. 56].

2. The doctor at San Cristobal said to respondent, in the presence of the master of the vessel, "The best thing to do was to go somewhere immediately where there was an *X-ray*, where I could get medical attention" [R. 59].

3. The pharmacist's mate, "said he had no *X-ray* or material to work with" [R. 62].

4. The first *X-ray* obtained after the injury was taken in San Diego [R. 66].

5. He was examined later by a doctor at San Cristobal, Galapagos, who applied a splint, but made no attempt to determine the exact nature of the fracture *because he had no X-ray facilities* [R. 104].

6. He was examined later by a doctor at San Cristobal, Galapagos, who applied a splint but made no attempt

to determine the exact nature of the fracture *because he had no X-ray equipment* [R. 106-107].

7. When the fracture occurs the taking of *X-rays* at once is *standard* practice today or *malpractice* is in the offing [R. 114].

8. If the injury had been *X-rayed* and properly treated three days after it occurred there would not have been any permanent disability [R. 116-117].

9. The *ideal* treatment is if *X-rays* are available to take pictures, and if not available immediately, to *get* them as soon as possible [R. 117-118].

Petitioners cannot understand how the court below could, in the face of the record in this case, say that "appellee's complaint at the time of trial was not predicated on the failure of the master to procure the X-rays". The record demonstrates that, from the time the complaint was filed until the last testimony was introduced by the respondent, one of his *principal* complaints was the fact that no X-ray had been taken until he got to San Diego.

One of the specifications of error was "that there is no evidence of any proximate causal connection between *any* alleged failure on the part of the defendants, or either of them, to exercise ordinary care in or about providing care and the condition of plaintiff's arm as it existed at the time of trial" [R. 39].

The gravamen of Dr. Gallant's testimony is that *proper* medical care requires the taking of an X-ray just as soon as it is reasonably possible to get one. Dr. Gallant did not testify with reference to *anything* which could or should have been done for the respondent in addition to what was done, with the sole exception of the omitted X-ray. Dr. Gallant's testimony does not prove or tend

to prove that the doctor at San Cristobal, Galapagos Island did not properly diagnose, properly reduce, and properly splint the respondent's fractured wrist. Dr. Gallant's testimony does not prove or tend to prove that the pharmacist's mate did not give to the respondent exactly that kind of surgical care which would have been given to respondent by any doctor anywhere in the world. The jury could not have used Dr. Gallant's testimony as the basis of a finding of negligence on the part of the master with the sole exception of the failure to obtain the X-ray.

In view of the fact that the complete record of what was done for Mr. Nordyke and the manner in which it was done is contained in the petition herein, it is the contention of petitioners that the sole and only basis upon which the jury could have made a finding that the master of the vessel negligently failed to perform his duty was the failure to obtain the X-ray.

It is a presumption of law, in the absence of evidence to the contrary, that the doctor at San Cristobal was a skillful and competent physician and that he did everything for respondent which could have been done by any ordinarily competent or ordinarily skillful physician anywhere in the world. The same may be said with reference to the pharmacist's mate in his capacity, as such. The fact that the reduction of the fracture was actually accomplished and that the treatment was clearly sufficient is established beyond all peradventure of doubt by the testimony of Dr. William Edwin McLellan, commanding officer of the United States Public Health Service in the San Diego district. His testimony has been set forth in the petition and it shows that when the respondent got to San Diego there was nothing whatever wrong with him. This expert testimony is uncontradicted.

Petitioners therefore contend that the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Honorable Court's power of supervision for the simple reason that the court below, in order to avoid the necessity of reversing the judgment because of the reception in evidence of the statements of the doctor at San Cristobal, the pharmacist's mate and the oral and written remarks of Dr. Gallant, which latter were based upon the hearsay statements of respondent, has stated that respondent's "complaint at the time of trial was not predicated on the failure of the master to procure the X-ray" [R. 245].

In the case of *Nashville, C. & St. L. Ry. Co. v. York,* 127 F (2d) 606, 610-612, it is held that the admission of testimony like that of Dr. Gallant is reversible error because it is incompetent.

The statements contained in the radio message sent by the Marine Hospital in San Francisco, made by the doctor at San Cristobal and by the pharmacist's mate, with reference to the necessity of obtaining an X-ray, were not competent for proof of any duty on the part of the master to obtain an X-ray or that a failure to obtain an X-ray was a negligent breach of duty.

The only purpose which an X-ray serves is to indicate the nature of a bony injury. If the injury is *known*, the function of an X-ray ceases. An X-ray is not used for the purpose of treating fractures. It is merely used for the purpose of diagnosing whether there is or is not a fracture.

Respondent's expert witness testified that in order for a doctor to tell from a surgical standpoint what the exact

injury was he would have to see either the patient *or* an X-ray exhibiting the bony condition [R. 119].

The evidence with reference to the failure to obtain an X-ray was most prejudicial for the reason that it gave the jury the definite impression that there had been a serious breach of duty. There is no proof in the record showing what an X-ray taken within the time specified by Dr. Gallant would have shown with reference to plaintiff's fracture. There is an entire absence of any evidence showing the slightest proximate causal connection between the failure to obtain an X-ray and the condition found and testified to by Dr. Gallant.

Another instance in which the court below has departed from the accepted and usual course of judicial proceedings is that it has held, in legal effect, that the master was negligent for the sole reason that he did not procure medical attention at some geographical location different from those at which medical care was furnished. The lower court has assumed, without any reference to any evidence which would justify the assumption, that the doctor at San Cristobal did not properly diagnose and reduce the fracture. It has also assumed, without referring to any evidence justifying the assumption, that the pharmacist's mate did not properly diagnose and properly splint the fracture. Dr. McLellan's testimony is not referred to at all. Yet his expert evidence proves beyond all reasonable doubt that the respondent received all the medical care and attention which his injury required.

Respondent's physical condition at the time he arrived in San Diego was a matter which was properly the subject of expert testimony. Dr. McLellan's opinion testimony was binding and conclusive.

In the case of *Arais v. Kalensnikoff*, 10 California Reports (2d) 428, 433, 74 Pac. (2d) 1043, the court states that the rule appears to be that whenever the subject under consideration is one within the knowledge of experts only, and is not within the common knowledge of laymen, the expert evidence is conclusive upon the question in issue.

The lower court has approved the instructions given by the learned trial judge at the request of the respondent as follows:

1. "The master, vessel and its owners are legally obliged to furnish *proper* medical care to the injured seaman within the earliest possible time. . . ." [R. 226].

2. "If you find from all the facts and circumstances in this case that said Francisco was negligent in failing to provide plaintiff with *proper* medical care, . . . the defendant company is liable for the consequences of Francisco's negligence" [R. 226].

The point involved here is that there is no requirement that the master or the vessel or its owners furnish *proper* medical care, the only requirement being that reasonable care be exercised to furnish means of cure, restricted to *ordinary* medical care and attention. These objections were clearly pointed out to the learned trial judge in the manner and at the time required by law [R. 215-216].

Petitioners know that several decisions have said that "cure" is used in its original meaning of care "and means *proper* care of the injured seaman." This Honorable Court used the same language in *The Iroquois (supra)*, and the Circuit Court of Appeals used it in *The Kenilworth*

(supra). However, the word was not selected and used by any court as the applicable adjective to define the *type* of medical care which must be provided until the dispute arose in the case at bar. No disputed *issue* as to the *propriety* of so defining the contractual duty has been presented to and decided by any court until now.

In *The Bouker No. 2*, 241 Fed. 831, 835, cited many times by this Honorable Court, cure was referred to as "the *ordinary* medical assistance and treatment in case of injury or acute disease, for a reasonable time" and the "expense of effecting a cure by *ordinary* medical means. This does not include *extraordinary* medical treatment . . ." (Emphasis added.)

The use of the adjective "proper" in the instructions given by the learned trial judge was particularly prejudicial in the case at bar because of the testimony of Dr. Gallant that if the injury were *properly* treated—put it all in the word "treatment"—I don't think there would have been any permanent disability [R. 117].

In the case of *Rasmussen v. Shickle*, 4 Cal. App. Rep. (2d) 426, 41 Pac. (2d) 184, the court says:

> "Aside from the inherent weakness manifest in the answer to establish negligence, proof of lack of *proper* care and skill in a given treatment or failure to treat in a certain way is not sufficient to establish a case of malpractice on the part of a physician. The law does not require that the advice, instructions and treatment given by a physician to a patient shall be at all events *proper*, or that his treatment should be such as to attain an approximate perfect result. It requires only, first, that he shall have the degree of learning and skill ordinarily possessed by physicians of good standing practicing in that locality, and,

second, that he shall exercise reasonable and ordinary care and diligence in treating the patient and in applying such learning and skill to the case. *Proper* treatment implies that no error shall be committed thereby, that an approximate perfect result will be produced, and that such result is guaranteed, whereas the law only demands that the physician use reasonable care to attain such approximate perfection." (Emphasis added.)

The foregoing authority demonstrates that there is no obligation on the part of a physician and surgeon, in and about the treatment of a patient, to furnish *proper* care. If there is no obligation on the part of a physician or surgeon, undertaking the treatment of a patient, to furnish *proper* care, petitioners cannot understand why the master of a vessel, not possessing the skill or judgment of a physician or surgeon, is obliged to furnish proper medical care. All that is required is that the master exercise ordinary care in and about furnishing ordinary medical means of cure. The instructions took the case far beyond the legal standard of care and in effect made the question of negligence on the part of the master dependent upon whether the care he furnished was "proper medical care" rather than permitting the jury to decide as a question of fact whether the master was guilty of any negligence consisting of a failure, if any, to furnish ordinary medical care.

The trial court, at the request of respondent, instructed the jury as follows:

> "As I have stated, the plaintiff claims in this case that his present condition is due to, and has been caused by the failure and neglect of the defendant to provide him with *adequate* and *competent* medical and

hospital services at the earliest reasonable opportunity. If the plaintiff has proved to your satisfaction, and by a preponderance of the evidence, under all the facts and circumstances of the case, that the defendant failed to supply him with *proper* medical care and attention at the earliest reasonable opportunity and that as a result thereof the use and strength of his hand and wrist have been lost in whole or in part due to *such* negligent failure on the part of the defendant, the plaintiff has made out a case and is entitled as a matter of law to damages from the defendant" [R. 225-226].

At the proper time and place, as required by law, petitioners objected to this instruction as follows:

"First, the language assumes as a fact that there has been a failure and neglect of the defendant to provide the plaintiff with adequate and competent medical and hospital service at the earliest reasonable opportunity; secondly, the jury is not left to find whether there has been a failure or neglect; and, third, there is no requirement that the defendants, or either of them, furnish the plaintiff with *adequate and competent* or adequate *or* competent hospital services, and whether the plaintiff required any kind of medical services, or any hospital services whatever, would be a question of fact for the jury, and this instruction invades the province of the jury, and states as a positive rule that the defendant was required to furnish hospital services. Fourth, there is no requirement that anything excepting a means of cure be provided, and there is no requirement that anything other than ordinary medical service be furnished.

"The defendants object to the portion of the instruction which permits the jury to render a verdict against the defendants in the event the defendants fail to supply him with proper medical care and attention at the earliest reasonable opportunity. That particular language in the instruction is subject to the objection that there has been testimony here by an orthopedic specialist given to the jury as a possible standard of the care required, and the instruction should be limited in every instance to a requirement that reasonable care be used in order to furnish ordinary medical care and attention" [R. 213-214]. (Emphasis added.)

The instruction last referred to states the claim of the respondent to the effect that his present condition is due to and has been caused by an actual failure and neglect on the part of defendant to provide him with *adequate* and *competent* medical and hospital services. There is no evidence in the case which indicates that the respondent required any hospital service at all. The mere fact, if it be a fact, that the defendant failed to supply the plaintiff with *proper* medical care and attention at the earliest reasonable opportunity would not, as a matter of law, amount to a *negligent* failure on the part of the defendant. Yet this instruction clearly told the jury that if the defendant failed in this respect such failure was a negligent failure. The instruction also states that the contractual duty requires the master to select, at his peril, a doctor who is unqualifiedly competent and that the treatment given be

unqualifiedly adequate. There is no such duty. This Honorable Court should not approve the action of the lower court in stating that there is any such duty.

The instruction should have been worded as follows: If the plaintiff has proved by a preponderance of evidence that the master of the vessel *negligently* failed to provide the plaintiff with *ordinary* medical care and attention at the earliest reasonable opportunity and that as a *proximate* result thereof the use and strength of his hand and wrist have been lost, in whole or in part, due to such, *if any*, negligent failure on the part of the master of the vessel, the plaintiff has made out a case and is entitled as a matter of law to damages from the defendant employer.

The instruction as given is quoted in the opinion of the lower court [R. 251] with the statement that the jury was *properly* charged in that respect.

If the judgment of the lower court is not reviewed by this Honorable Court the law with reference to the obligation of shipowners with reference to medical care and attention will undergo a material change.

The definition of the adjective "proper" in Webster's New International Dictionary, Second Edition, precludes any approval by this Honorable Court of a decision which fastens upon shipowners, as a matter of law, the duty to provide an injured seaman with "proper medical care and attention."

One of the definitions given is "strictly pertinent or applicable; exact, correct; . . ." Another is "fine; excellent; . . ."

If the care must also be competent and adequate, masters of vessels will be required to have sufficient medical and surgical knowledge to enable them to examine the doctors as to their competency.

Conclusion.

It is respectfully submitted that a writ of certiorari should be issued.

Dated, Los Angeles, California, April 24th, 1944.

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Attorney for Petitioners.